[APPELLATE CRIMINAL JURISDICTION]

CHAN CHAN SENG—(Appellant)

vs.

PUBLIC PROSECUTOR—(Respondent)

[SELANGOR MAGISTRATE'S CRIMINAL APPEAL No. 28 of 1932]

Criminal law—lottery ticket—what constitutes a—Common Gaming Houses, Enactment No. 19 of 1912, S. 4 (i) (d).

Before a prosecution for selling or offering for sale or delivering any lottery ticket within the meaning of S. 4 (i) (d) of the Common Gaming Houses Enactment of 1912 can succeed, it must be established that a public lottery exists and that the paper or writing purporting to be a lottery ticket will entitle the holder on the happening of the event or contingency which decides the lottery to receive money or money's worth.

Where a section comprises more than one act which constituted an offence, the prosecution should make up their minds with which of those offences they propose to charge the accused. If they are not sure which of the offences the facts they can prove will establish against the accused, they should charge him with both offences in the alternative.

Where three charges were preferred against the accused and the Magistrate convicted him on the third charge and stayed the other two, the Magistrate should, at the conclusion of the case, either convict or discharge, and not leave an accused person with other charges hanging over his head after the hearing has been concluded.

The Judge on this point referred to:—

Rex v. *Mills*, Law Times, January 23, 1932. Vol. 173/57.

Rex v. *Surrey Justices ex parte Witherick* 172. L. T. Jour. 406. W. N. 1931. 259.

APPEAL from the conviction by the Magistrate, Kuala Lumpur, of the appellant on a charge of selling or delivering a lottery ticket to Detective Police Constable No. 229 in contravention of Section 4 (i) (d) of Enactment No. 19 of 1912. The appeal was heard before Thorne, Ag. C. J.

The facts and arguments appear sufficiently from the Judgment.

Knowles, (*Veerasamy* with him), for the Appellant.

Cussen, for the Respondent.

Cur. Ad. Vult.

THORNE, AG. C. J.—The appellant was charged before the Magistrate, Kuala Lumpur, on three charges, the last of which was that on the 17th day of June 1932, at premises No. 33 Petaling Street, he sold or delivered a lottery ticket to Detective Police Constable No. 229, an offence punishable under section 4 (i) (d) of Enactment No. 19 of 1912.

At the conclusion of the case the Magistrate said that he found against the accused on all the three charges, but in order to obviate more than one sentence, he convicted the accused under the third charge only, staying the other two. The sentence was that the appellant should pay a fine of $25, or, in default of payment, undergo one month's rigorous imprisonment, and the confiscation of certain sums of money was ordered.

The appellant preferred an appeal against this conviction and sentence.

The learned Magistrate in his careful reasons for judgment holds that the evidence for the prosecution was sufficient to establish first, the existence of a lottery, and next the participation of the accused in the conduct of that lottery. He therefore held the accused guilty, and convicted him.

The ticket, the subject of the charge in this case, is by itself innocuous. It purports to be a ticket of admission to the new premises of the Sundry Goods Dealers Guild, and is in terms stated to be a free pass for admission to the new building of the Guild, is to be used once only and is not to be sold.

The evidence of a detective proved that he visited No. 33 Petaling Street, and spoke to the accused. He asked the accused if he had any Chop Foh Hong tickets starting with the figure 2. The accused said that he had only tickets the numbers of which started with the figure 1 or 3, and asked the detective to call again the following day. Next day the detective called again and referred to his interview of the previous day. The appellant then went to a room at the back of the premises, and returned bringing with him a number of tickets, all in book form and fastened together by a clip. The detective examined these and found that all the serial numbers started with the figures 2 or 5. He took the first ticket out of one of these books, whereupon the appellant asked him for money, and he paid $1.

On the 17th of June, at about 9-30 a.m. he again visited the same shop, and asked the appellant if he had any more tickets starting with the figure 2. The appellant again entered the back room, and the detective followed him. From a space between the rear of a showcase and the wall, the appellant produced 7 or 8 tickets, not in books, one of which the detective took, and paid him a marked one dollar note. The appellant asked the detective his name. He gave it without comment and the appellant then wrote his name down in a note book.

Later the same day the premises were entered under a search warrant, and a number of tickets were found upon the premises. There were also found a note book the marked one $ note some lists of numbers, slips of paper with numbers on them, and other books which contained lists of names and numbers.

No explanation was offered in the evidence as to the reason for the detective having asked for Chop Foh Hong tickets, or why he asked for tickets bearing particular numbers.

Again, the tickets state upon their face that they are free and, when asked to pay for the ticket, one would have expected the detective to enquire the reason for his being asked to pay for a free ticket, but when he was asked for money, he paid the sum of $1 without more. It is a great pity that the detective did not make some enquiry of the appellant upon these questions.

Mr. Knowles for the appellant argued that the prosecution had failed to establish against the appellant the charge of selling a lottery ticket, for the reason that no sufficient evidence was led to establish the existence of a lottery, or that the ticket was a lottery ticket within the definition to be found in section 2 of Enactment No. 19 of 1912.

The facts proved by the prosecution raised beyond all doubt a case of grave suspicion. But is the evidence sufficient to establish the charge against the appellant? I think not. The ticket on the face of it is a perfectly innocent document. The definition of a lottery ticket under section 2 of the Enactment is as follows:—

> "'Lottery ticket' includes any paper or figure or writing or symbol or other article whatsoever which either expressly or tacitly entitles or purports to entitle the holder or any other person to receive any money or money's worth on the happening of any event or contingency connected with any public lottery."

If the prosecution allege that any paper or writing innocent in itself in fact entitles the holder to receive any money on the happening of any event or contingency connected with a public lottery, it seems to me that they must establish in the first place the existence of a public lottery, and in the next place that the paper or writing will entitle the holder, on the happening of the event or contingency which decides the lottery, to receive money or money's worth.

Lottery is defined as follows:—

> "'Lottery' includes any game, method or device whereby money or money's worth is distributed or allotted in any manner depending upon or to be determined by chance or lot, whether the same be held, drawn, exercised, or managed within or without the Federated Malay States."

Every lottery is deemed to be a public lottery until the contrary is proved.

I am unable to find, from the facts in this case, that the prosecution has proved the existence of a lottery. There is no evidence as to the amount to be distributed, or as to the chance or lot upon which the person or persons are to be entitled to share in that sum. Nor is there anything in the evidence beyond the proof of the ticket to show that it is a paper or writing entitling the holder to receive any money.

It is to be remembered that the issue and sale of counterfoil tickets numbered serially is the everyday practice of many places of entertainment. Organisers of other functions issue such tickets free of charge. The persons responsible for the issue of such tickets do not normally conduct a lottery, though it is possible for them to do so.

It is also possible for members of the public, who have nothing to do with the original issue of such tickets, to conduct a lottery using the series of such tickets for the purposes of their lottery. But in order to convert a ticket otherwise innocent into a 'lottery ticket' within the meaning of this Enactment, it is necessary for the prosecution to establish first, that a lottery is being conducted, and that the ticket in question will entitle the holder to a prize in that lottery.

Mr. Cussen urged upon me that the evidence in this case established that, though innocent in form, these tickets were in fact not so, or at least the appellant was clearly not using these tickets for the innocent purpose for which they purport to have been issued.

This being so, he pressed upon me that the ticket, the subject of the charge, could only be a ticket in a lottery. I am unable to accept this argument.

The evidence establishes that the ticket was intended to be used for some purpose other than that which on its face appears to have been the purpose of its issue, but one is not, in my view, entitled to assume what is that purpose.

It may be this ticket was not intended to be used as a lottery ticket, but as entitling the holder to enter some premises where some form of gambling was to be conducted, and that the ticket entitled the holder, without further payment, to participate once in that gamble.

I mention this as showing the danger of assuming a fact in a criminal prosecution.

In my opinion the evidence for the prosecution failed to establish either the existence of a lottery, or that the ticket was a lottery ticket

within the definition, and I therefore allow this appeal, quash the conviction, sentence, and the order for confiscation, and order that the fine, if paid, and the monies confiscated be repaid to the appellant.

Two other matters I should mention. In my view the charge includes two offences, namely the offence of selling a lottery ticket, and that of delivering a lottery ticket. The matter was not argued on the appeal, but in my view, where a section, as in this case, comprises more than one act which constituted an offence, the prosecution should make up their minds with which of those offences they propose to charge the accused. If they are not sure which of the offences the facts they can prove will establish against the accused, they should charge him with both offences in the alternative.

The other matter is this. Three charges were preferred against the accused, and at the conclusion of the case, the Magistrate convicted the accused on the third charge and stayed the other two. I think this practice is unsatisfactory. At the conclusion of the case the Magistrate should either convict or discharge, and not leave an accused person with other charges hanging over his head after the hearing has been concluded.

Appeal allowed.

Solicitor for the Appellant—*S. Veerasamy.*

[ORIGINAL CIVIL JURISDICTION]

TUEH GUAT CHOO alias TIN WAT CHOO (f)

vs.

CHEAH AH HOE and YONG POW MENG.

[PERAK CIVIL SUIT No. 160 OF 1932.]

Land Code 1926, Section 42—Indefeasibility of title of registered proprietor.

Held that "fraud" within the meaning of the land code means actual fraud and not what is known as constructive or equitable fraud.

Assets Company Ltd. v. Mere Roihi (1905 A.C. p. 176) and Waimiha Sawmilling Company Ltd. v. Waione Timber Company Ltd. (1926 A.C. p. 101) followed.

In 1924 the Plaintiff bought the land the subject-matter of this suit with moneys of her own and from her husband's Estate, and the title thereto was registered in the name of her son, the first defendant. Relations between the Plaintiff and the first defendant became unfriendly and on 17th day of August 1926 she lodged a caveat over the land in question. On October 8, 1929, the first defendant issued a warning to the caveat. On October 23, 1929, the Plaintiff instituted C.S. No. 581/29 against the first defendant for a declaration that he held the said land as trustee for her, for a transfer of the said land and for possession. On the same day the Plaintiff filed a summons for an extension of the caveat but the order was not obtained till November 4, 1929. On November 4, 1929, the first defendant charged the said land to the second defendant for $2,500. On March 16, 1931, judgment was given in favour of the Plaintiff in Civil Suit No. 581/29. On July 6, 1931, the second defendant obtained an order for sale under the charge. On March 6, 1932, the Plaintiff instituted this suit to have the said charge declared null and void and be cancelled, for an order to have the said order of sale set aside, for possession and mesne profits.

Johnson for Plaintiff

Joseph for Defendant No. 1

Seenivasagam (with him *Chin Swee Onn*) for Defendant No. 2.

Johnson opened on the facts. *Joseph* did not wish to address the Court. In closing the case for the Defendant No. 1. *Seenivasagam* submitted that accepting the Plaintiff's evidence without reservation the Plaintiff had failed to prove that defendant No. 2 was guilty of fraud within the meaning of the Land Code.

He referred to the Port Swettenham Case (1913 A.C. 491) and said it was thought in this country that the decision of the Privy Council in this case was to introduce equitable doctrines into the Land laws of the F.M.S. There was some justification for it prior to the 1926 Land Code, but there could be no doubt that such a view cannot be supported now in view of the repeal of various illustrations to the Specific Relief Enactment.

He cited:

Assets Company Ltd. v. *Mere Roihi* (1905 A.C. p. 176) and

Waimiha Sawmilling Company Ltd. v. *Waione Timber Company Ltd.* (1926 A.C. p. 101) followed.

and submitted that notice was not fraud within the meaning of the Land Code.

Johnson in reply contended that defendant No. 2 had full and actual notice of the Plaintiff's rights to the land in question and was guilty of fraud when he obtained the charge.

Cur. Ad. Vult.

GERAHTY, J.—By her plaint the Plaintiff claims (1) that a charge for $2.500.00 with interest in respect of the land comprised in Perak Grant for Land No. 15747 executed by the first defendant in favour of the second defendant be declared null and void and be cancelled;